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In The
Supreme Court of the United States

April Term [redacted] 1968

No. 1329

State of New Hampshire, Petitioner

v.

Atomic Energy Commission, and United States of America, Respondents Vermont Yankee Nuclear Power Corporation, Intervenor

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Petition For A Writ of Certiorari To The United States Circuit Court of Appeals For The First Circuit

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In The
Supreme Court of the United States

April Term 1969

No.

STATE OF NEW HAMPSHIRE, Petitioner

v.

ATOMIC ENERGY COMMISSION, AND UNITED STATES OF AMERICA, Respondents
VERMONT YANKEE NUCLEAR POWER CORPORATION, Intervenor

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

THE STATE OF NEW HAMPSHIRE, a duly organized body politic, with offices in Concord, County of Merrimack, State of New Hampshire, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on January 13, 1969, for which a rehearing was denied on January 27, 1969.

CITATION TO OPINIONS BELOW

The pertinent provisions of the Memorandum and Order of the Atomic Energy Commission dated April 8, 1968 are unreported and is printed in Appendix B. The opinion of

The Circuit Court of Appeals for the First Circuit is unreported and is printed in Appendix B.

JURISDICTION

The judgment of the Circuit Court of Appeals for the First Circuit was entered on January 13, 1969. Rehearing was denied on January 27, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the U. S. Atomic Energy Commission, when administering the provisions of Title 42, U.S.C. ss. 2011, et seq. is required as a matter of law to consider evidence regarding the potential effects of thermal pollution on the environment and the ecology of the subject area which may be caused by the proposed facility.

2. Whether the U. S. Atomic Energy Commission abused its discretion in failing to consider evidence regarding the potential effects of thermal pollution on the environment and the ecology of the subject area which may be caused by the proposed facility.

3. Whether the actions of the U. S. Atomic Energy Commission in granting a license to the Intervenor "Vermont Yankee" for the operation of a nuclear power plant deprived the State of New Hampshire and its citizens of their property without due process of law and the payment of just compensation as required by the U. S. Constitution, 5th Amendment.

STATUTES INVOLVED

The 5th Amendment to the U.S. Constitution is involved and is printed in Appendix A. Also involved is the Atomic Energy Act of 1954, as amended 42 U.S.C. 2011, *et seq.;* the Federal Water Pollution Control Act, 33 U.S.C. 466

et seq.; and the Water Quality Act of 1965, 79 Stat, 903. These statutes being too voluminous to print in full; the pertinent sections thereof are printed in Apendix A. Also printed in Appendix A are the pertinent sections of Executive Order No. 11288 (31 F.R. 9261).

STATEMENT

The Vermont Yankee Nuclear Power Corporation filed an application with the AEC on December 2, 1966, for a construction permit and operating license for a nuclear power station to be located in the town of Vernon, Vermont. After consideration and amendment, the AEC, pursuant to the Atomic Energy Act of 1954, as amended and the regulations in Title 10, CFR, Part 50 "Licensing of Production and Utilization Facilities," Part 2, "Rules of Practice." issued a "Notice of Hearing on Application for provisional Construction Permit". This notice was published in the Federal Register on June 30, 1967 (32 Fed. Reg. 9334).

The AEC Licensing Board held a prehearing conference on July 18, 1967 at Brattleboro, Vermont. The State of New Hampshire at the conclusion of the prehearing conference filed a motion to intervene, which was eventually accepted by the Board. The Board held the first phase of the hearing in Brattleboro on the 1st and 2d of August 1967. The second phase of the hearing was held on the 6th and 7th of September. At the hearings considerable evidence was proferred by the States of New Hampshire and Vermont and the Commonwealth of Massachusetts on the potential effects of thermal pollution on the environment and the ecology of the subject area which may be caused by the proposed facility. By order of the Board dated October 26, 1967 the hearings were closed.

The State of New Hampshire seasonably filed requests for findings of facts and rulings of law. It also filed mo-

tions to stay the proceedings pending final judicial review. Such motions and requests were denied. The Board in an initial decision, dated December 8, 1967, granted "Vermont Yankee" a provisional construction permit. Exception was seasonably taken by the State of New Hampshire, and the matter was transferred to the full Commission. On April 8, 1968 the Commission issued a "Memorandum and Order" affirming the Boards decision. To this ruling the State of New Hampshire requested a rehearing. Said rehearing was denied on May 8, 1968.

The State of New Hampshire seasonably took an appeal to the United States Court of Appeals for the First Circuit. Jurisdiction was involved persuant to the provisions of 28 U.S.C. s. 2342 (Supp.) and 42 U.S.C. 2239.

The Vermont Yankee Nuclear Power Corporation proposes to construct and operate a boiling water nuclear powered facility at Vernon, Vermont. Vernon, Vermont is located on the Connecticut River, at a point four miles more or less upstream from the Massachusetts border. New Hampshire territory extends to the natural high water mark on the westerly (Vermont) side of the River. The River has been declared a "cold water fishery" by the effected States and the Federal Government. Such a classification requires that the stream will be suitable for the propagation of anadromous species of fish (Salmon, shad, trout).

The facilities as initially designed proposed to draw a maximum instantaneous circulating flow of 780 c.f.s. from the river. The applicant had indicated that the flow regimen of the river would be re-regulated by upstream dams to provide a maximum flow of 1200 c.f.s. for the facility. The water taken from the river would pass through the condensers, at the assumed 100 percent load factor and circulating water flow, and its temperature would be raised 20.2°F. Under the initial plans the water would be re-

turned to the river over a river bank aerator with an assumed temperature reduction of 2.2°F. Thus at the point of discharge there will be temperature increases of the stream of up to 18°F and in the Vermont Dam Compound, which is approximately 2,500 feet away, the temperature rises will far exceed 4°F.

During the course of the hearings "Vermont Yankee" changed the design of the facility to include cooling towers. Cooling towers would permit the utilization of the facility in such a manner as to regulate the temperature of the water being returned to the river. Thus the company could, as they saw fit, vary the temperature of the water returning to the river from a high of 18°F to a low of 0°F. However, it should be noted that the AEC assumed no control over the operation of the towers.

The intervening States attempted to introduce evidence of the potential effects of thermal pollution which would be caused by the operation of the proposed facility. Their evidence being rejected, they made offers of proof, indicating that the introduction of heat into the River would have the following effect.

a. Remove the D.O. (Dissolved Oxygen) from the water thus eliminating the ability of the river to accept treated sewerage. Thus the water would become polluted and eliminate its use for fishing, bathing and drinking.

b. The introduction of heat and the rapid changes in temperature would destroy the use of the river as a cold water fishery. These water temperatures effect the fish population as follows:

i. Cause death by thermal shock.

ii. Trigger the spawning device prematurely.

iii. Create a thermal barrier which prevents the passage of the fish upstream to the spawning grounds.

c. The effects on the ecology of the river were such as could create algae and destroy all plant and animal life.

The States further requested that unless the Atomic Energy Commission assumed jurisdiction of this phase of the case there could be *no effective State regulation*. The rational of this intervenor was that the applicable State laws and posture of "Vermont Yankee" was such that irreparable harm would be done to the river and its ecology. The Atomic Energy Commission was asked to assume its responsibility as follows:

1. Hear all evidence relative to the potential effects of thermal pollution.

2. Issue an order for the construction and operation of the facility predicated on compliance with applicable Federal Laws and the laws of New Hampshire, Vermont and Massachusetts. (specifically N. H., R.S.A. Chapter 149)

On January 13, 1969 the Circuit Court of Appeals for the First Circuit held in favor of the Respondent and on January 27, 1969 it denied Petitioners Motion for rehearing.

REASONS FOR GRANTING WRIT

Relief is being sought from this court for the following reasons:

(1) The specific question involved, to wit, the interpretation of the powers of the Atomic Energy Commission, has not to date been decided by this Court.

(2) The lower Court's decision effectively destroys the State's powers to regulate the discharge

of effulent from facilities into State waters, pursuant to N. H. R. S. A. Chap. 149 and similar State Statutes.

(3) The actions of the Atomic Energy Commission are the initial steps in the taking of private property without due process of law. Such act is prohibited by the 5th Amendment to the U. S. Constitution.

The burning issue of our times being presented squarely to this Court is, can a Federal Agency act oblivious to and in total disregard of the duties of other Federal and State Agencies to protect the rights of the public and in effect, deter if not totally destroy the work and purposes of such agencies. The Atomic Energy Commission has authorized the construction of a one hundred twenty million dollar facility which when constructed and operating would create thermal pollution in the Connecticut River. Such action is contrary to the duties of the States and the Federal Government to rid our waters of pollution. If this action is permitted to stand the millions of dollars invested by State, Federal and private sources to rid the Connecticut River of pollution would be rendered worthless. The public would also be deprived of its right to use the waters for recreation and industrial purposes. This perpetuation of this principal will also have a detrimental effect upon other areas of the government and the private sector.

The State of New Hampshire argues that the Atomic Energy Act of 1954 as amended 42 U. S. C. S. 2011 et seq. gives the Atomic Energy Commission the power to review aspects of thermal pollution in one of the following manners.

(1) It may review evidence of thermal pollution and make definite findings of fact relative to same.

> (2) It must at least review the evidence relative to thermal pollution to determine whether or not other States or Federal Agencies are affected. If other States or Federal Agencies are involved and licenses or permits are required then any license or permit issued by the Atomic Energy Commission must be predicated upon obtaining such permit from the affected State or Federal Agency.

The determination of the issue at bar turns on the definition of the term "health and safety of the public" as used in the Atomic Energy Act of 1954 as amended 42 U. S. C. s. 2011 et. seq. Said Court in effect held that there was no statutory definition of the term "health and safety of the public." It further held that the "plain meaning" of said term would compel consideration of all aspects of thermal pollution; however, the statutory history of the Act precluded this determination.

The Court relied heavily on the Case of *Power Reactor Development Co.* v. *International Union of Electrical Workers* 376 U. S. 396, 409 (1961), which gave great weight to the activity and/or inactivity of the Joint Committee on Atomic Energy. The failure of the Joint Committee to speak in the face of the Commission's continual refusal to consider aspects of thermal pollution led the Court to the conclusion that the Atomic Energy Commission did not have jurisdiction over thermal pollution.

Petitioner argues that the Circuit Court by giving the action of the Joint Committee on Atomic Energy the effect of law misinterpreted the decision in the *Power Reactor Development Co.*, case, supra. A full review of the facts would compel a finding that the A. E. C. had jurisdiction over aspects of thermal pollution. In support of this proposition we advance the following arguments.

1. *Power Reactor Development Co.,* supra did not deal with the issue of thermal pollution.

2. The inaction of Congress, and the Joint Committee on Atomic Energy may have some bearing on procedural aspects of the Commission's work but should be totally disregarded with respect to substantive issues such as the review of thermal pollution which would be caused by the proposed facility when operated.

3. Pollution of the air and natural resources is the second most important domestic problem in this Country.

4. Congress, The President, the States, and the Private Sector have spoken out in the area of pollution. Two specific instances, though misinterpreted by the Circuit Court, are 33 U. S. C. s. 466 et. seq. and Executive Order No. 11288 (31. F. R. 9261)

The second phase of this Appeal deals with the violation of the Constitutional rights of the citizens of New Hampshire by the taking of their rights to use industrially and recreationally the Connecticut River. As a practical matter once the facility is constructed no action can effectively prevent the use of this one hundred twenty million dollar facility. Thus by permitting the Utility Company to build the facility it is giving it the right to use the waters of the Connecticut River which will deprive the citizenry of N. H. of their use of same without due process of law contrary to the 5th Amendment to the U. S. Constitution.

The proposition that private property may not be taken from one citizen for the use of another in a non governmental capacity is prohibited. *Brest* v. *Jacksonville Expressway Authority,* 194 So. 2d 685 aff'd 202 So. 2d 748

(1967); *Rundee Inlet Authority* v. *Bascum et al.* 206 Va. 906, 147 SE 2d 131 (1967)

It is argued that there is a taking of private property rights by the Atomic Energy Commission either by setting in motion or the direct action of its controlled licensee in the eventual use of the waters of the Connecticut River. Such action violates the provisions of the 5th Amendment to the U. S. Constitution as follows:

1. The Utility and the A. E. C. have no statutory authority to take property in this manner by eminent domain.

2. The action is a taking of private property for other private individuals in a commercial (non governmental use).

3. The action is a taking of private property without due process of law, and the payment of just compensation. The Utility now as a practical matter may avoid the necessity of acquiring a permit under N. H. R. S. A. Chapt. 149 and complying with the water quality standards relative thereto.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted

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APPENDIX A

UNITED STATES CONSTITUTION

AMENDMENT 5.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

* * *

UNITED STATES CODE

TITLE 42

s. 2013 *Purpose of chapter.*

"It is the purpose of this chapter to effectuate the policies set forth above by providing for—

(a) a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress;

(b) a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification

of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress;

(c) a program for Government control of the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare, and to provide continued assurance of the Government's ability to enter into and enforce agreements with nations or groups of nations for the control of special nuclear materials and atomic weapons;

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public;

(e) a program of international cooperation to promote the common defense and security and to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defense and security will permit; and

(f) a program of administration which will be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation, which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate. (Aug. 1, 1946, ch. 724, s. 3, as added Aug. 30,

1954, ch. 1073, s. 1, 68 Stat. 922, and amended Aug. 26, 1964, Pub. L. 88-489, s. 3, 78 Stat. 602.)"

* * *

s. 2011 *Congressional declaration of policy.*

"Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that—

(a) the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and

(b) the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise. (Aug. 1, 1946, ch. 724, s 1, as added Aug. 30, 1954, ch. 1073, s. 1, 68 Stat. 921.)"

* * *

s. 2021 Cooperation with States.

" . . . (k) *State regulation of activities for certain purposes.*

Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

* * *

s. 2133 Commercial licenses.

". . . (b) *Nonexclusive basis.*

The Commission shall issue such licenses on a nonexclusive basis to persons applying therefor (1) whose proposed activities will serve a useful purpose proportionate to the quantities of special nuclear material or source material to be utilized; (2) who are equipped to observe and who agree to observe such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish; and (3) who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public. All such information may be used by the Commission only for the purposes of the common defense and security and to protect the health and safety of the public.

(c) Each such license shall be issued for a specified period, as determined by the Commission, depending on the type of activity to be licensed, but not exceeding forty years, and may be renewed upon the expiration of such period.

* * *

s. 2201. General duties of Commission.

"In the performance of its functions the Commission is authorized to—

. . . (b) *Standards governing use and possession of material.*

establish by rule, regulations, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property;

UNITED STATES CODE

TITLE 33

s. 466 (h) *Cooperation to Control Pollution from Federal Installations.*

"(h) It is declared to be the intent of the Congress that any Federal department or agency having *jurisdiction* over any *building, installation,* or *other* property shall, insofar as practicable and consistent with the interests of the United States . . . cooperate with . . . any State . . . having jurisdiction over waters into which any matter is discharged from such property, in preventing or controlling the pollution of such waters."

* * *

EXECUTIVE ORDER 11288

(31 F.R. 9261)

"Prevention, Control, and Abatement of Water Pollution by Federal Activities.

"By virtue of the authority vested in me as President of the United States and in furtherance

of the purpose and policy of the Federal Water Pollution Control Act, as amended (33 U.S.C. 466), and Reorganization Plan No. 2 of 1966 (31 F.R. 6857), it is ordered as follows:

"SECTION 1. Policy. The heads of the departments, agencies, and establishments of the Executive Branch of the Government shall provide leadership in the nationwide effort to improve water quality through prevention, control, and abatement of water pollution from Federal Government activities in the United States. In order to achieve these objectives—

"(1) . . .

"(2) . . .

"(3) Pollution caused by all other operations of the Federal Government, such as water resources projects and operations under Federal loans, grants, or contracts, shall be reduced to the lowest level practicable;

"(4) Review and surveillance of all such activities shall be maintained to assure that pollution control standards are met on a continuing basis;

"(5) The Secretary of the Interior shall, in admininistering the Federal Water Pollution Control Act, as amended, provide technical advice and assistance to the heads of other departments, agencies, and establishments in connection with their duties and responsibilities under this order;

"(6) The head of each department, agency, and establishment shall ensure compliance with Section 11 of the Federal Water Pollution Con-

trol Act, as amended (33 U.S.C., 466h), which, as modified by Reorganization Plan No. 2 of 1966 (31 F.R. 6857), declares it to be the intent of Congress that Federal departments and agencies shall, insofar as practicable and consistent with the interests of the United States and within available appropriations, cooperate with the Secretary of the Interior and with State and interstate agencies and municipalities, in preventing or controlling water pollution; and

"(7) Water pollution control needs shall be considered in the initial stages of planning for each new installation or project, and the head of each department, agency, and establishment shall establish appropriate procedures for securing advice and for consulting with the Secretary of the Interior at the earliest feasible stage.

"SEC. 2. (a) . . .

" (b) . . .

"Sec. 3. (a) .. .

" (b) . . .

"SEC. 4. General standards. (a) Federal installations shall provide secondary treatment, or its equivalent, for all wastes except cooling water and fish hatchery effluents. Discharge of wastes into municipal sewerage systems maintaining adequate treatment is hereby declared to be the preferred method of disposal. However, whenever connection to such a system is not feasible, the department, agency, or establishment concerned shall be responsible for installing its own waste treatment system. Upon an applica-

tion of the head of a department, agency, or establishment, a degree of treatment less than secondary may be approved with respect to an agency-installed system in an exceptional case if the Secretary of the Interior finds that a lesser degree of treatment is adequate to protect the quality of the receiving waters.

"(b) If discharge of cooling water is expected to create problems by significantly increasing the temperature of the receiving waters, facilities shall be installed, or operating procedures shall be established, to maintain water temperatures within acceptable limits.

"(c) . . .

"(d) No waste shall be discharged into waters if it contains any substances in concentrations which are hazardous to health.

"(e) No waste shall be discharged into waters if it contains any substances in concentrations which will result in substantial harm to domestic animals, fish, shellfish, or wildlife, if methods of treatment or disposal are available that will remove or render harmless such pollutants. If such methods are not available, but can reasonably be developed, they will be developed and used at the earliest possible date. A determination that such methods are not available or cannot reasonably be developed will not be made without the concurrence of the Secretary of the Interior.

"(f) The head of each department, agency, and establishment shall, with respect to each installation in the United States under his jurisdiction, make, or cause to be made, such surveys as

may be necessary to ensure that discharges of waste effluents from activities concerned with radioactivity are in accord with the applicable rules, regulations, or requirements of the Atomic Energy Commission (10 CFR, Part 20) and the policies and guidance of the Federal Radiation Council as published in the FEDERAL REGISTER.

"(g) Construction and operating plans for waste treatment facilities shall include space for the conduct of necessary laboratory analyses and for the maintenance of records of results thereof whenever the size and complexity of the system makes this necessary.

"(h) Construction and operating plans for waste treatment facilities shall take into account water quality standards promulgated pursuant to the provisions of the Water Quality Act of 1965 (79 Stat. 903).

"(i) . . .

"SEC. 5. . . .

"SEC. 6. (a) . . .

" (b) . . .

"SEC. 7. Review of facilities or operations supported by Federal loans, grants, or contracts. (a) The head of each department, agency, and establishment shall conduct a review of the loan, grant, and contract practices of his organization to determine the extent to which water pollution control standards similar to those set forth in this order for direct Federal operations should be ad-

hered to by borrowers, grantees, or contractors with respect to their operations in the United States. The head of each department, agency, and establishment shall review all such activities for which there is a significant potential for reduction of water pollution and develop appropriate recommendations for accomplishing such reduction. In conducting this review, necessary technical assistance should be sought from the Secretary of the Interior and the heads of other appropriate Federal agencies. A report on the results of this review shall be submitted to the Director of the Bureau of the Budget by July 1, 1966.

"(b) The heads of departments, agencies, and establishments are encouraged to prescribe regulations covering loan, grant, or contract practices designed to reduce water pollution.

"SEC. 8. . . .

"SEC. 9. . . .

APPENDIX B

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

COMMISSIONERS:

Glenn T. Seaborg, Chairman
James T. Ramey
Gerald F. Tape
Wilfrid E. Johnson

DOCKET NO. 50-271

In the Matter of

VERMONT YANKEE NUCLEAR POWER CORPORATION

(Vermont Yankee Nuclear Power Station)

MEMORANDUM AND ORDER

On December 8, 1967, an atomic safety and Licensing board, in an initial decision, ordered that a provisional construction permit be issued under Section 104 b. of the Atomic Energy Act to the Vermont Yankee Nuclear Power Corporation, the applicant herein, to build a boiling water reactor at the applicant's site in the town of Vernon, Vermont. The initial decision also authorized the grant to the applicant of an interim exemption from the financial qualifications requirements of 10 CFR Part 50.

The State of New Hampshire, an intervenor in this proceeding, has filed exceptions to the initial decision and to certain earlier rulings of the board. These exceptions are premised principally on the board's refusal to consider, for lack of jurisdiction, the matter of thermal effects of facility cooling water discharges on the Connecticut River. The

State asks that the Commission remand the proceeding to the board for further consideration, "including a review of the effects of thermal pollution", and that we enter an order staying the provisional construction permit.

Exceptions to the initial decision, with a request for oral argument, have also been jointly filed by the following: the Power Planning Committee of the Municipal Electric Association of Massachusetts; the Town of Shrewsbury, Massachusetts, Electric Light Plant; the Town of Wakefield, Massachusetts, Municipal Light Department; and the City of Chicopee, Massachusetts, Municipal Lighting Plant (collectively, the "Massachusetts Municipals"). These exceptions ask that we reverse the board's denial of intervention to the Massachusetts Municipals and that we remand the proceeding to the board to receive evidence and make findings principally in the following areas: whether the form of ownership and organization for the project, or the proposed license, would tend to create or maintain a situation inconsistent with the antitrust laws; and whether the instant application covers a "commercial" project rather than a "research and development" project.

The staff and the applicant completed the filings before us with briefs submitted on January 10, 1968, which opposed both sets of exceptions as well as the need for oral argument thereon.

The proposed Vermont Yankee facility will employ a single-cycle, forced circulation, boiling water reactor with an initial power level of 1593 megawatts thermal and an ultimate expected operating capability of 1665 megawatts thermal. The reactor has a core of the same high power density as the core authorized for use in the Tennessee Valley Authority's Browns Ferry Units 1 and 2 but will be approximately one-half the size of the Browns Ferry core. The facility will have a field-fabricated pressure vessel of a design essentially identical to that approved for

construction in Monticello Unit No. 1 of the Northern States Power Company.

As is the case with other power reactors licensed by the Commission, the Vermont Yankee facility will incorporate a variety of design features and systems for the protection of plant employees and the public. The initial decision describes the primary and secondary containment systems and the principal engineered safeguards for the maintenance of core and containment integrity both in normal operation and under emergency conditions.

The application and its eight amendments have been reviewed by the regulatory staff and the Advisory Committee on Reactor Safeguards, both of which have concluded that there is reasonable assurance the proposed facility can be constructed and operated without undue risk to the health and safety of the public. Except as regards matters raised by the State of New Hampshire relative to thermal effects (discussed more fully below), neither of these appeals question the similar health and safety conclusion of the board—a conclusion we also share from our review of the record.

The Massachusetts Municipals, as earlier stated, have requested oral argument on their exceptions. We believe, however, that the matters covered by the exceptions can be adequately dealt with on the basis of the written arguments already submitted and that oral presentations are unnecessary.

Exceptions of the State of New Hampshire

We address our attention first to the exceptions which have been filed by the State of New Hampshire. A brief recital of the proceedings before the board which bear on these exceptions will be helpful in placing them in appropriate context. Following commencement of the hearing, the board granted petitions for leave to intervene filed

by the State of New Hampshire, the State of Vermont, and the Commonwealth of Massachusetts. All three States asked the board to assert jurisdiction over matters relating to thermal effects of the operation of the proposed facility on the Connecticut River. The States sought to introduce evidence intended to show that operation of the plant without a cooling tower system for reducing the temperature of water discharged into the River would result in harm to the natural resources of the River. The regulatory staff and the applicant objected to the introduction of the proffered evidence on the ground that thermal effects are a matter outside the jurisdiction of the board and the Commission. The board, in a series of rulings which are summarized in the initial decision and the notes appended thereto, sustained these objections and ruled the evidence inadmissible.

During the course of the hearing, the applicant noted its intention to install an open-cycle cooling tower system for the facility. Pursuant to a request of the board, the applicant prepared and submitted to the board and the parties design information on the proposed system. This information was reviewed by the staff and the Advisory Committee on Reactor Safeguards, both of which reported favorably on the design of the proposed system as respects radiological health and safety considerations.

As reflected in the initial decision, in their response to the supplemental evidence submitted by the applicant with respect to its cooling tower system, the States took the position that the evidence submitted was insufficient and incomplete. The States argued that water quality standards for the Connecticut River are presently being formulated; that the open-cycle cooling tower system described by the applicant might not be capable of meeting these standards once they are set; and that a safety analysis of the system might not cover what is ultimately required. It was also asserted that the applicant did not furnish sufficient detail

about its proposed accommodation to the final water quality standards.

In the initial decision, the board stated its view that the evidence submitted by the applicant with respect to the proposed cooling tower facilities was sufficient for purposes of this proceeding. The board explained that an applicant for a provisional construction permit is not required to supply all the technical information needed for a construction permit which approves all design features. It went on to state that our regulations also anticipate that changes may be necessary in the design of a facility after a construction permit has been issued and provide procedures for obtaining approval of such changes. In this context, the board concluded, the possibility that the applicant may sometime in the future have to change the design of its proposed installation to accommodate State requirements, is entirely compatible with the nature of a provisional construction permit proceeding.

Of the three intervening States, only the State of New Hampshire has excepted to the initial decision. The 28 tersely-stated exceptions filed by New Hampshire are accompanied by no explanatory brief. Rather, the State, in support of its position that the exceptions noted constitute reversible error, "cites for such authority its prior Memorandum of Law incorporated in its offer of proof and the Memorandum of Law submitted by the Commonwealth of Massachusetts". In responding to these exceptions, the staff and the applicant have, save in one instance,[1] dealt

[1] In Exception #28, the State disputes the board's order denying a motion to make the proceeding a contested one. It asserts that this involves a failure on the part of the board "to follow the standards of review for a contested proceeding pursuant to 10 CFR § 2.104". The staff points out, and we agree, that the initial decision makes it clear that the board followed the stricter standards for review applicable to a contested proceeding. The board's findings and conclusions on the issues satisfied the requirements for a contested proceeding as did its independent review leading thereto. 10 CFR § 2.104(b). In addition, the board expressly declared that it observed the rules on *ex parte* communications applicable to a contested proceeding. 10 CFR § 2.719.

with them in terms of two basic issues raised rather than responding to each exception separately. Our examination of the State's exceptions, in the light of the memoranda to which it has referred, leads us to agree that the two basic issues which these exceptions present are:

(a) Whether the Atomic Energy Act of 1954, as amended, vests in the Commission jurisdiction to consider in the licensing and regulation of nuclear facilities health and safety matters other than those relating to radiological health and safety; and

(b) Whether the provisions of the Federal Water Pollution Control Act, as amended by the Water Quality Act of 1965, and Executive Order 11288 enlarge the Commission's regulatory jurisdiction.

For the reasons set forth below, we believe that both of these issues must be resolved against the position taken by the State of New Hampshire.

Any jurisdictional inquiry in this regard must begin, of course, with our own Act. It is clear from an examination of the sections of the Act which bear on the licensing and regulation of nuclear facilities and materials that a guiding criterion for the Commission is that its authority be exercised so as to *protect the health and safety of the public.*[2] We believe it further evident, however, that the considerations of public health and safety to which the Act speaks are those which relate to the special hazards generated by the operation of nuclear facilities and the use of nuclear materials. Stated in other terms, the Commission's regulatory authority in the health and safety area is limited under the Act to matters of radiological health and safety. That such is the purport of the Act is

[2] See, e.g., Sections 53, 103, 104, 161 b. and i., and 182 of the Act.

reflected in its "Findings" and "Purpose" (Sections 2 and 3) and in the relevant statutory definitions (see, e.g., Section 11 v. and cc.). These bounds to the reach of the Act find further expression in authoritative Congressional statements respecting the statute's scope[3] and in amendments to the Act itself.[4]

In line with our understanding of the authority respecting public health and safety matters which the Act confers upon the Commission, we have consistently interpreted the Act as confining that authority to considerations of radiological health and safety. The provisions of 10 CFR Part 50, which set forth criteria for the issuance of licenses for production and utilization facilities, establish, insofar as public health and safety in concerned, standards which relate to assurance of protection against radiological hazards. (See also, 10 CFR Parts 20, 70 and 100.) Furthermore, our rules of Practice, 10 CFR Part 2, express our recognition that thermal effects, as contrasted to radiological effects, are a matter outside the jurisdiction of atomic safety and licensing boards and the Commission and are not relevant to the issues in a licensing proceeding. 10 CFR Part 2, App. A., Sec. III(c)(7). This limitation on the Commission's jurisdiction is further reflected in adjudicatory determinations under our licensing program.[5]

[3] See, S. Rep. No. 390, 89th Cong,, 1st Sess., where the Joint Committee on Atomic Energy, in reporting favorably on a 1965 amendment to Section 271 of the Act, stated the recognition "by the drafters" of the 1954 Act "that AEC's regulatory control was limited to considerations involving the common defense and security and the protection of the health and safety of the public with respect to the special hazards associated with the operation of nuclear facilities." (p. 4).

[4] Section 274 of the Act, enacted as an amendment in 1959, provides procedures under which the Commission may relinquish to individual States certain health and safety authority over nuclear materials. Section 274 a, states that one of the purposes of the section (reiterated in the implementing subsections) is: "(2) to recognize the need, and establish programs for, cooperation between the States and the Commission with respect to control of radiation hazards associated with use of such materials."

[5] See, *Matter of Consolidated Edison Co. of New York, Inc.*, Memorandum and Order dated November 24, 1965 (3 AEC 62); *Matter of Jersey Central Power and Light Co.*, Initial Decision dated December 4, 1964 (2 AEC 446,447), affirmed, Decision dated May 6, 1965 (3 AEC 28).

We think it additionally worth noting that this consistent interpretation of the scope of our regulatory authority, in the form of both regulations and adjudications, has been brought to the attention of the Congress, including the Joint Committee on Atomic Energy.

The limitations imposed upon our jurisdiction by the Atomic Energy Act are not altered, we believe, by the Water Quality Act of 1965 (P. L. 89-234).* The State of New Hampshire contends that this Act requires all Federal agencies to act in such a manner as to abate and avoid pollution and that it enables the Commission to control thermal effects in the exercise of its regulatory authority. The State lays particular emphasis on the provision which states (33 USC 466 h.):

> "It is declared to be the intent of Congress that any Federal department or agency having jurisdiction over any building, installation or other property shall, insofar as practicable and consistent with the interests of the United States and within any available appropriations, cooperate with . . . any State . . . having jurisdiction over waters into which any matter is discharged from such property, in preventing or controlling the pollution of such waters."

The foregoing provision is applicable by its terms to buildings, installations or other property over which a Federal agency has jurisdiction. While the cited language thus covers installations owned by or operated for the Commission, the Commission does not exercise over licensed facilities the kind of jurisdiction which the statute contemplates. Plainly, the terms of the statute in no way

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*The Water Quality Act of 1965 affected extensive amendments to the earlier-enacted Federal Water Pollution Control Act (P. L. 86-660). The Clean Water Restoration Act of 1966 (P.L. 89-753) further amended the Federal Water Pollution Control Act.

purport to enlarge the Commission's regulatory jurisdiction under the Atomic Energy Act.

The State of New Hampshire also places reliance on Executive Order 11288, promulgated by the President on July 2, 1966 (31 F.R. 9261), in furtherance of the purpose and policy of the Federal Water Pollution Control Act. In support of its position, the State cites several sections of the Executive Order, including subsection (3) of Section (1), which provides:

> "(3) Pollution caused by all other operations of the Federal Government, such as water resources projects and operations under Federal loans, grants, or contracts, shall be reduced to the lowest level practicable;"

We think the State's arguments in this regard are misplaced. Executive Order 11288 is, by its terms, directed to Federal installations, facilities and buildings ("direct Federal operations") and to other operations of the Federal Government, such as those under Federal loans, grants or contracts. The Commission's licensing relationship to nuclear facilities does not bring those facilities within the purview of the Executive Order's coverage of "direct Federal operations"; nor, in our view, are there any AEC "loans, grants, or contracts" which would make subsection (3) of Section (1) of the Executive Order applicable to the Vermont Yankee facility. Moreover, as an overriding consideration, we cannot attribute to Executive Order 11288 the intent or effect of revising the Commission's regulatory authority in any manner not provided for in the legislation under which it was issued.

In sum, it is our view that the Commission's regulatory jurisdiction under the Atomic Energy Act respecting public health and safety does not include control over thermal effects of a nuclear facility and that no enlargement of our

jurisdiction is effected by the Water Quality Act of 1965 or Executive Order 11288.[7]

Before leaving the matter of thermal effects, several additional observations are in order. While, under present law, our regulatory jurisdiction as respects public health and safety is limited to radiological hazards, the States and the Federal Water Pollution Control Administration of the Department of the Interior do have authority to deal with thermal effects of power plant discharges, under the statutes previously cited. The board correctly pointed out, in this regard, that no licensing action on our part relieves a power reactor license from any obligation to comply with applicable State and Federal controls.[8]

What has been stated above, leads us to a further comment. Our regulatory staff, in the course of its licensing review, makes it a practice to seek the expert advice of the Fish and Wildlife Service of the Department of the Interior as to the radiological aspects of the release of effluents from proposed nuclear power plants. The Fish and Wildlife Service and, more recently, the Federal Water Pollution Control Administration have also furnished the regulatory staff with recommendations concerning non-radiological matters relating to thermal effects from plant cooling water discharges. The AEC has, in turn, transmitted these recommendations on thermal effects to the li-

[7] While the point is now moot as a practical matter, we must also reject the State of New Hampshire's contention that the board erred in making its initial decision immediately effective and in not staying the issuance of the provisional construction permit pending an appeal to the Commission. In our view, the board's actions were fully consistent with the Commission's regulations. 10 CFR § 2.764.

[8] In this connection, we should further note our agreement with the board that the possibility that the applicant may later have to change the design of its proposed installation to accommodate State requirements, is compatible with the nature of a proceeding for a provisional construction permit. The evidence submitted by the applicant respecting the proposed cooling facilities was sufficient for purposes of this proceeding. Our regulations, as the board stated, anticipate that changes may be necessary in the design of a facility after a construction permit has been issued and set forth procedures for review and approval of such changes. See, 10 CFR § 50.58, 50.59, 50.90 and 50.91.

cense applicant and to appropriate State and local authorities and has encouraged the applicant to cooperate with the cognizant governmental agencies. To the best of our knowledge, this cooperation usually has been forthcoming. The course described above has, we think, served a useful purpose and we have recently agreed with the Department of the Interior that this procedure should be continued pending enactment of any new legislation in this area.

We would, as a concluding comment, emphasize earlier declarations we have made in support of programs seeking to protect the Nation's fish and wildlife resources from thermal effects of plant discharges. This is a potential problem which is not unique to nuclear facilities but one which also attends the operation of power plants using fossil fuels. While a number of legislative proposals have been introduced in the Congress which would enlarge the regulatory authority of this and other Federal agencies to deal with the matter of thermal effects, our present authority is, necessarily, that prescribed by existing law.

* * *

It is therefore ORDERED that the exceptions filed by the State of New Hampshire and by the Massachusetts Municipals are denied. Further proceedings and decision in respect of the matter of financial qualifications shall be effected as indicated hereinabove.

By the Commission.

W. B. McCool
Secretary

Dated: April 8, 1968

United States Court of Appeals
For the First Circuit

No. 7142.

THE STATE OF NEW HAMPSHIRE,
PETITIONER

v.

ATOMIC ENERGY COMMISSION and
UNITED STATES OF AMERICA,
VERMONT YANKEE
NUCLEAR POWER CORPORATION,
INTERVENOR.

PETITION FOR REVIEW OF AN ORDER OF THE
ATOMIC ENERGY COMMISSION

Before ALDRICH, *Chief Judge,*
MCENTEE and COFFIN, *Circuit Judges.*

R. Peter Shapiro, Special Counsel, for petitioner.
Marcus A. Rowden, Assistant General Counsel, with whom *Joseph F. Hennessey,* General Counsel, *Howard K. Shapar;* Assistant General Council, Licensing & Regulation, *William C. Parler,* Attorney, Atomic Energy Commission, *Edwin M. Zimmerman,* Assistant Attorney General, and *Seymour H. Dussman,* Attorney, Department of Justice, were on brief, for Atomic Energy Commission et al., respondents.
Warren F. Farr, John A. Ritsher, and *Ropes & Gray* on brief for Vermont Yankee Nuclear Power Corporation, intervenor.

January 13, 1969.

COFFIN, *Circuit Judge.* The state of New Hampshire seeks review of an order of the Atomic Energy Commission (AEC), granting a provisional construction permit

to the Vermont Yankee Nuclear Power Corporation, organized by ten New England utility companies (applicant), to build a nuclear power reactor at Vernon, Vermont, a site on the Connecticut River, bordering New Hampshire. The permit was issued at the conclusion of a reactor licensing proceeding held under the authority of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011, *et seq.*

The narrow but important issue is whether the Commission erred in refusing to consider, as outside its regulatory jurisdiction, evidence of possible thermal pollution of the Connecticut River as a result of the discharge of cooling water by applicant's facility. The proposed installation, a "boiling water" reactor, differs from a conventional electric power plant in that the turbine generators which produce the electrical energy are driven by steam derived from the heating of water by the fissioning of uranium in the reactor core. "Thermal pollution" is used to designate the effects on a river—its water, flora and fauna—of the injection of heated water.

Applicant's application, filed on December 2, 1966, was subjected to review by the Commission's staff, in the course of which eight amendments were added, and by the Advisory Committee on Reactor Safeguards. At the subsequent public hearings before an atomic safety and licensing board, the states of New Hampshire, Vermont, and Massachusetts were granted leave to intervene. All three states sought to introduce evidence intended to show that operation of the facility without a cooling tower system for reducing the temperature of water discharged into the river would harm the natural resources of the river.[1] The board ruled such evidence inadmissible on the

[1] Without purporting to make a definitive summary of the extensive testimony and offers of proof as to such alleged harm, we note the following general thrust of the rejected evidence.

The states of Vermont, New Hampshire, Massachusetts and Connecticut have agreed to a new, upgraded future use classification for the Connecticut River which would make it more suitable for bathing and recreation, provide

grounds that it related to matters beyond the Commission's jurisdiction, was proscribed by the Commission's Rules of Practice, and was not directed to the issues noticed for hearing.

The hearing occupied four days, August 1 and 2, and September 6 and 7, 1967. On the fourth day, applicant noted during the hearing for the first time that it would expand the proposed facility to include cooling towers in its open cycle system. It thereafter made three subsequent written submissions on this aspect of its plans. These were reviewed by the Commission's regulatory staff and the Advisory Committee on Reactor Safeguards solely for their impact on radiological health and safety and were found satisfactory. The three states contended that the supplemental evidence was incomplete and in insufficient detail, that the addition of the towers might not enable the facility to meet the newly evolving water quality standards for the river, and that more safety precautions might ultimately be required. The board concluded that, notwithstanding

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an excellent fish and wildlife habitat, and a source of public water supply, assuming appropriate treatment. A program for encouraging Atlantic salmon and other anadromous fish is actively being considered.

The estimated temperature increases in the river, if applicant's facility were constructed without cooling towers, would have a variety of deleterious effects. The major effects were alleged to be a substantial reduction in dissolved oxygen and consequent capacity to assimilate municipally treated waste; a change in the nature of aquatic plants and bottom fauna resulting, for example, in an increase of odiferous algae; and destruction of opportunity to develop the river as a cold water fishery.

The latter conclusion was supported by proferred testimony that the presence of a zone of water of substantially higher than natural temperature would (1) serve as a thermal barrier preventing fish from reaching their spawning grounds at the river's headwaters, (2) prematurely trigger spawning, with resultant loss of fish population from inadequate terrain for depositing roe, and (3) cause, through the abrupt change in temperature, thermal shock to migrating fish, especially young smolt and fish weakened from the reproductive process. Among the kinds of fish threatened are walleye pike, small mouth bass, perch, brown and rainbow trout, shad, and Atlantic salmon.

In addition to these possible thermal effects, the discharge of algacides used in cleaning the facility's cooling system was alleged to be potentially toxic to fish, as was the transmission of increasing concentrations of radioactive matter from aquatic invertebrates through radionuclides passed on to fish through the food chain. While the latter claim would not seem to us to be necessarily irrelevant to "public health and safety", we find no suggestion in the offers of proof that human consumers of fish would be harmed.

the possibility that some changes might later be necessary, a provisional construction permit could be issued. It issued its initial decision, finding favorably for applicant on the issues of public health and safety "within the meaning of those terms as authorized by the Commission".

New Hampshire filed exceptions to this decision, contending that the Commission had responsibility for considering the effects of thermal pollution, not only under the Atomic Energy Act of 1954, but also under the Water Quality Act of 1965, P.L. 89-234, and Executive Order 11288 (31 F.R. 9261). The Commission denied the exceptions, relying on sections of the Atomic Energy Act relating to findings, purpose, and definitions; Congressional statements and subsequent amendments; its own regulations and rules of practice and its own adjudications. It held that neither the Water Quality Act of 1965 nor Executive Order 11288 were applicable to installations which it did not own or operate.

The Commission pointed out that no licensing action on its part relieved a licensee from any obligation to comply with state authorities or the Federal Water Pollution Control Administration of the Department of the Interior which do have jurisdiction to deal with thermal effects of power plant discharges. Its own efforts, pending action on legislative proposals to enlarge the authority of the Commission and other federal agencies, are limited to forwarding recommendations relating to thermal effects received from other federal agencies to applicants and state and local authorities and encouraging cooperation by the applicant with the proper governmental agencies.

We confront a serious gap between the dangers of modern technology and the protections afforded by law as the Commission interprets it. We have the utmost sympathy with the appellant and with the sister states of Massachusetts and Vermont which took the same position

before the Commission. That position was simply that adequate planning be required of the applicant *before* a construction permit is issued in order to assure all feasible protection against thermal pollution instead of waiting until heavy investment has been made, and damage has occurred or is imminent.[2] To delay the day of reckoning is to invite the unnecessary dilemma of choosing between harming natural environment, with harmful effects on even the health and well being of humans, and frustrating the needed production of power.

In a sense there is no statutory chasm. The Atomic Energy Act itself is replete with many references to *"health and safety of the public".*[3] But in its section on definitions, defining twenty-nine terms, 42 U.S.C. § 2014, including "common defense and security", any attempt to delimit "health" and "safety" of the public *is singularly in absentia.* There is therefore considerable appeal to New Hampshire's plea that we ascribe to these terms their present day plain meaning, which would not exclude all of the alleged adverse effects attributed to thermal pollution (e.g., those having to do with reducing the waste assimilative capacity of the river).

Tempting as it may be, we do not presently feel that we fulfill our function responsibly by simply referring to the dictionary. This is perhaps a more legitimate occasion than most for invoking Mr. Justice Holmes' aphorism that "A page of history is worth more than a volume of logic." *New York Trust Co.* v. *Eisner,* 256 U.S. 349 (1921). Or, conceding that there is a gap, an open space, between the law as interpreted by the Commission and by the Congress, and a demonstrable social interest, we may well be mindful

[2] The same position has been taken by other public bodies and citizens' groups relative to the planning of other nuclear power facilities. *See, e.g.,* National Fisherman, December, 1968, pp. 21-A, 22-A [dispute over planned discharge of cooling water from proposed facility at Turkey Point, Florida].

[3] *See, e.g.,* Sections 53 b., 63 b., 81, 103 d., 104 d., 161 b., and 161 i. 42 U.S.C. §§ 2073 (b) 2093 (b), 2099, 2111, 2133 (d), 2134 (d), 2201 (b), and 2201 (i).

of Mr. Justice Cardozo's admonitory gesture, "Even within the gaps, restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action." Cardozo, *The Nature of the Judicial Process,* p. 114.

Here we feel a very *palpable restriction* in the history surrounding the problem addressed by the Congress, the subsequent Congressional confirmation of the limited approach taken by the Commission, the contemporary efforts in the Congress to broaden that approach, and a recognition of the complexity of administrative arrangements which would attend a liberal definition of public health and safety as these terms are used in the Atomic Energy Act.

The history of the 1954 legislation reveals that the Congress, in thinking of the public's health and safety, had in mind only the special hazards of radioactivity.[4] Moreover,

[4] The Senate and House Reports, in contrasting conditions in 1954 with those when the Atomic Energy Act of 1946 became law, said, "Moreover, there was little experience concerning the health hazards involved in operating atomic plants, and this fact was in itself a compelling argument for making the manufacture and use of atomic materials a Government monopoly. . . . It is now evident that greater private participation in power development need not bring with it attendant hazards to the health and safety of the American people." Senate Report No. 1699, Vol. 1. *Legislative History of the Atomic Energy Act of 1954,* p. 751; House Report No. 2181, *id.* p. 999.

Very little else on the subject of health and safety can be found in the massive three volume Legislative History; only four unilluminating references to these words are contained in the index. It seems obvious to us that these terms were beyond the purview of the 1954 deliberations and that their meaning had been deemed settled at the time of passage of the Atomic Energy Act of 1946.

In the Senate Report accompanying this earlier legislation, the establishment of an absolute government monopoly of production of fissionable material was in part justified by the observation that such production "is attended by serious hazards to public health and safety. The responsibility for minimizing these hazards is clearly a governmental function." Sen. Rep. No. 1211, U.S. Code Cong. Service, 79th Cong., 2d Sess., 1946, p. 1330. More clearly, in commenting on § 12 of the Act, granting various kinds of authority to the Commission, the report described one of the grants as to "Establish safety and health regulations for the possession and use of fissionable and byproduct materials to minimize the danger from explosion, radioactivety, and other harmful or toxic effects incident to the presence of such materials." *Ibid.*, p. 1335. Section 12 of the Act was more brief, speaking of "danger from explosions and other hazards." *Ibid.*, p. 736. We see no motive other than one of simplifying language in the delection of "from explosions and other hazards" in the 1954 legislation.

we note the very special relationship, crystallized in statutory form between the Commission and the Joint Committee on Atomic Energy—a relationship that is rarely embodied in positive law. 22 U.S.C. § 2252.[5] The Joint Committee, in its first study report, made its focus clear when it said, "The special problem of safety in the atomic field is the consequence of the hazards, created by potentially harmful radiations attendant upon atomic energy operations." Joint Committee Print, *A Study of Atomic Energy Commission Procedures and Organization in the Licensing of Reactor Facilities,* 85th Cong., 1st Sess., p. 4 (1957).

The Commission has been consistent in confining itself to these hazards. Its regulations as to licensing and standards have specified the objective as eliminating radiological danger. 10 C.F.R. Parts 20, 70, 100. Its adjudications have been bottomed on a similar concern. *See, e.g., Matter of Consolidated Edison Company,* Nov. 24, 1965 (3 AEC 62); *Matter of Jersey Central Power and Light Company,* May 6, 1965 (3 AEC 28). Its Rules of Practice have proscribed, as a nonjurisdictional matter, "the thermal effects (as opposed to the radiological effects) of the facility operation on the environment". 10 C.F.R. Part 2, Appendix A. III(c)(7). The Joint Committee has not, so far as we have been led to believe, disapproved of this concept of the Commission's concern.

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[5] Under section 2252 the Joint Committee is charged with making continuing studies of problems relating to the Commission's work, with receiving information requested from all government agencies relative to the Commission's responsibilities, and with receiving all legislative proposals concerning the control of atomic energy. It was this section on which the Supreme Court placed particular emphasis in *Power Reactor Development Co.* v. *International Union of Electrical Workers,* 376 U.S. 396, 409 (1961) when it said:

> "It may often be shaky business to attribute significance to the inaction of Congress, but . . . considering especially the peculiar responsibility and place of the Joint Committee on Atomic Energy in the statutory scheme, we think it fair to read this history as a *de facto* acquiescence in and ratification of the Commission's licensing procedures by Congress . . . ."

Subsequent amendments, perfected and attempted, shed additional light on the deliniation of scope intended by the Congress. In 1959 the Congress provided for the Commission's relinquishing to the states control over nuclear materials and activities. For the first time the legislation spoke in terms of "protection of the public health and safety from radiation hazards". 42 U.S.C. § 2021(b). The same statute, 42 U.S.C. § 2021(k) specified that there was no intent to restrict states or local agencies in regulating activities "for purposes other than protection against radiation hazards". In 1965, after *Maun* v. *United States,* 347 F.2d 970 (9th Cir. 1965) had held that the Commission was subject to other agencies, federal, state, and local, concerning the generation, sale, and transmission of electric power, the Congress amended 42 U.S.C. § 2018 to make clear that no federal, state, or local agency had any power of control over activities of the Commission. The Joint Committee, in its report (S. Rep. No. 390, 89th Cong., 1st Sess., p. 4, 1965) said, ". . . AEC's regulatory control was limited to considerations involving the common defense and security and the protection of the health and safety of the public with respect to the special hazards associated with the operation of nuclear facilities."

While the reference to "special hazards" may not be conclusive, any doubt as to the Congressional meaning disappears when we take note of the unsuccessful prosecution of a number of bills, including some by members of the Joint Committee on Atomic Energy, which would have required the Commission to condition a license on conformance to standards relating to thermal effects. All of these proposals were postponed by the 90th Congress for further consideration. It is obvious that there is a genuine issue as to whether the Commission or the Department of the Interior should have jurisdiction to require conformance with applicable water quality standards by nuclear power facilities. *See* comments of the Department

of Justice on H.R. 18667 and S. 3851, Hearings on Participation by Small Electrical Utilities in Nuclear Power before the Joint Committee on Atomic Energy, 90th Cong., 2d Sess., Part 2, Appendix 20, at p. 1377.

In short, we conclude that, in enacting the Atomic Energy Acts of 1946 and 1954, in overseeing its administration, and in considering amendments, the Congress has viewed the responsibility of the Commission as being confined to scrutiny of and protection against hazards from radiation.

New Hampshire has sought to bulwark its case by invoking the 1965 amendments to the Federal Water Pollution Control Act, 33 U.S.C. § § 466 *et seq.*, and Executive Order 11288, 31 F.R. 9261, which was subsequently issued in furtherance of that act as amended.

Section 466h of the act, declares the Congressional intent

> "That any Federal department or agency having jurisdiction over any building, installation, or other property shall . . . cooperate with . . . any State . . . having jurisdiction over waters into which any matter is discharged from such property, in preventing or controlling the pollution of such waters."

New Hampshire argues that the Commission's power to condition, revoke, suspend and modify licenses, 42 U.S.C. §§ 2233-2238, 10 C.F.R. § 50.54, constitutes "having jurisdiction", even though the owner and operator of the facility is a private corporation.

That this language was intended to encompass only installations owned by and operated for the government, rather than those subject to the government's regulatory powers, is made clear by the legislative history—antece-

dent and subsequent.[6] This proprietary interpretation of jurisdiction is reinforced by consideration of the unsuccessful attempt in the 90th Congress to broaden the coverage of § 466h to include any "federal department or agency . . . which . . . issues any lease, license, or permit . . . for any activity." This amendment, S. 3206, sponsored by *Senator Muskie,* passed the Senate but was not accepted by the House during the closing days of the Congress for the specific reason that there was inadequate time to consider "[t]he implications of a basic change in Government policy". (Remarks of Congressman Clark, House manager of the legislation, 114 Cong. Rec. H 10000, daily ed., October 14, 1968.)

Executive Order 11288, addressed to implementing the Federal Water Pollution Control Act, supplies no additional comfort to New Hampshire. It repeats the statutory objective of maximizing cooperation with the states, § 1 (6), and states that "Water pollution control needs shall be considered in the initial stages of planning for each new installation", § 1(7). But subsequent sections 2-6 refer only to existing and new federal installations. Only section 7 goes beyond direct operations in directing agency and department heads to review loan, grant, and contract practices with a view to determining "the extent to which water pollution control standards similar to those set forth in this order for direct Federal operations should be adhered to by borrowers, grantees, or contractors . . . ." In the case before us, applicant falls into none of these classes.[7]

[6] The conference report, explaining the language. 102 Cong. Rec. 11154, stated that it applied to "Federal agencies discharging matter into any waters." Subsequent provisions added to § 466h in 1961 referred specifically to "any discharges allegedly contributing to pollution from any Federal property" and, in the event of any hearing related to "such discharges," to the giving of notice to "The Federal agency having jurisdiction over the property."

[7] New Hampshire asserts that "the nature of the permit and license agreement is clearly contractual in nature." While the mutual undertaking in such a license agreement may be "contractual in nature," this fact does not convert a license into the type of contract for operations envisaged by the Executive Order. New Hampshire's argument that applicant will receive a federal loan or grant of nuclear material is denied, on a factual basis, by the Commission, which further observes that 42 U.S.C. § 2061 (dealing with ownership of government production facilities) is not applicable.

We conclude that the licensing board and the Commission properly refused to consider the proffered evidence of thermal effects. *We do so with regret that the Congress has not yet established procedures requiring timely and comprehensive consideration of non-radiological pollution effects in the planning of installations to be privately owned and operated.* But the very fact that complex questions of jurisdiction among federal agencies, of federal-state relations, of procedure, and even of specialized staff and appropriations must be resolved indicates the inappropriateness of any judicial fiat—particularly when the legislative branch is actively seised of the problem.

One final issue is raised by New Hampshire's argument that the Commission's action has resulted in a taking of property—i.e., use of the Connecticut River—from the citizens of New Hampshire generally without due process and just compensation and for a private as contrasted to a public use. The Commission's response, that the provisional construction permit merely authorizes construction of a facility, that it does not authorize the use of water from the Connecticut River, and that the applicant is not relieved from any obligation to comply with applicable state and federal laws, seems a sufficient one.

Affirmed.

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IN THE

Supreme Court of the United States

October Term, 1968

STATE OF NEW HAMPSHIRE,
Petitioner,

v.

ATOMIC ENERGY COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE STATE OF VERMONT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

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STATE OF NEW HAMPSHIRE,

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ATOMIC ENERGY COMMISSION, ET AL.,

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BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE STATE OF VERMONT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The State of Vermont, as *amicus curiae* pursuant to Rule 42 of the Rules of this Court, respectfully submits that the petition of the State of New Hampshire for a writ of certiorari in Case No. 1329 should be denied. The *amicus curiae* takes the position that none of Petitioner's three "Reasons For Granting Writ" (Pet. 6-7) show a need for review of the decision below by this Honorable

Court. However, the *amicus curiae* will limit its opposing argument herein to Petitioner's "Reason" which most directly concerns the State of Vermont and its regulatory agencies, namely that

> "(t)he lower Court's decision effectively destroys the State's powers to regulate the discharge of effluent from facilities into State waters, pursuant to N.H.R.S.A. Chap. 149 and similar State Statutes." (Pet. 6-7).

INTEREST OF THE AMICUS CURIAE

The interest of the State of Vermont in the federal agency jurisdictional question presented herein is twofold:

1. The State is primarily concerned with maintaining intact the jurisdiction of its own water pollution control agency over the activities of facilities located within the borders of the State of Vermont.

2. Vermont is, in addition, vitally interested in assuring an additional source of electric power supply for its citizens at the lowest possible cost, consistent with applicable health and safety standards, and in time to meet the rapidly growing needs of Vermont power consumers.

The primary issue herein is whether the Atomic Energy Commission was required in its licensing proceeding to consider thermal effects on the Connecticut River which would be created by the construction of a heated water-type nuclear electricity generating unit. As will appear hereinafter, the Vermont Water Resources Board has full jurisdiction over such effects and, in fact, exercised such jurisdiction following initial unsuccessful efforts by the States of Vermont, New Hampshire and Massachusetts to invoke Atomic Energy Commission jurisdiction. Assumption at this time of jurisdiction over such effects by the Atomic Energy Commission would, as a practical matter, oust the jurisdiction of the Vermont Board, duplicating and nullifying its exhaustive proceedings already held on this very question. Moreover, it is clear that remand to the Commission for duplicative evidenciary hearings and consideration of the thermal pollution issue would delay completion of the facility beyond the date when its additional power is absolutely required by Vermont consumers and would result in additional interest and inflation expenses, thereby unnecessarily raising the ultimate cost of power to Vermont power users.

ARGUMENT

THE LOWER COURT'S DECISION HAS NO EFFECT WHATSOEVER ON STATE POWER TO REGULATE DISCHARGE OF EFFLUENT INTO STATE WATERS AND CERTIORARI SHOULD NOT BE GRANTED ON THIS GROUND

Petitioner asserts that the Court of Appeals' decision at issue herein "effectively destroys" state power to regulate discharge of effluent into its waters. Yet the decision actually has precisely the opposite effect. All that the First Circuit decision says is that Congress has not given to the Atomic Energy Commission jurisdiction to regulate such discharge. *New Hampshire v. Atomic Energy Commission,* 406 F.2d 170, 175-176 (1969). In the absence of such preemptive federal regulation of a subject matter essentially local in nature, state jurisdicition is plenary. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 10L.ed.2d 248, 256-259, reh. den. 374 U.S. 858, 10 L.ed.2d 1082 (1963). And, in fact, as noted by the First Circuit in its opinion:

> "(t)he Commission pointed out that no licensing action on its part relieved a licensee from any obligation to comply with state authorities * * * which do have jurisdiction to deal with thermal effects of power plant discharges." *New Hampshire v. Atomic Energy Commission,* 406 F.2d 173.

The existence of state power to regulate pollution-producing activities is not and never has been an issue in this proceeding. Since it is not such an issue, this Court should refuse to consider it and, *a fortiori,* should not grant certiorari. *Neely v. Eby Construction Co.,* 286 U.S. 317, 18 L.ed.2d 75, 85 (1967).

Moreover, New Hampshire in fact accepted the jurisdiction of the Vermont Water Resources Board, acting under 10 V.S.A. § 909, and participated fully in the Board's evidenciary hearing on the question, among others, of thermal pollution of the Connecticut River by the Vermont Yankee plant. The Board made extensive findings and, *inter alia,* required as a condition of its permit the construction of very costly cooling towers and maintenance of the river water temperature at certain specified increases above normal temperature. Amended findings and amended conditions to the final order of permit were made as the result of exceptions filed by the Petitioner herein. The Vermont Water Resources Board

further retained continuing jurisdiction to reopen the proceeding and modify the conditions of its permit order at the written reques of any party or if its own inspections should indicate that the unit is causing a harmful effect on the ecology of the river or on its ability to accept treated sewage.

In conclusion, it is the position of the State of Vermont that the "destruction" of state power over thermal effects on the Connecticut River is not listed by Petitioner as a "Question Presented," has never been an issue in this proceeding and was not a ground of the lower Court's decision, and that certiorari should therefore not be granted on that basis. The Commission quite properly made a determination that it did not have jurisdiction over thermal effects and did not concern itself with what other governmental authority might have such jurisdiction.

CONCLUSION

For the reasons stated above, the Petition in No. 1329 for a writ of certiorari should be denied.

Respectfully submitted,

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EDWIN H. AMIDON, JR.
Assistant Attorney General

May 1969

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1329

THE STATE OF NEW HAMPSHIRE, PETITIONER

v.

ATOMIC ENERGY COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE ATOMIC ENERGY COMMISSION AND THE UNITED STATES OF AMERICA IN OPPOSITION

We respectfully invite the attention of the Court to the following facts which demonstrate that the petition was filed out of time:

In this proceeding in the court of appeals petitioner sought review of an order of the Atomic Energy Commission authorizing the issuance of a provisional construction permit to the Vermont Yankee Nuclear Power Corporation to build a nuclear power reactor at Vernon, Vermont. The judgment of the court of appeals, rejecting petitioner's contentions and affirming the Commission's order, was entered on January 13, 1969, and a petition for rehearing was denied

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on January 21, 1969. By motion dated April 25, 1969, and received by mail at this Court on April 26, 1969—95 days after the petition for rehearing was denied—petitioner applied to Mr. Justice Fortas for an extension of time to May 1, 1969, within which to file a petition for a writ of certiorari. On April 28, 1969, Mr. Justice Fortas extended the time for filing to May 1, 1969, "without prejudice to the Court's consideration of whether this application has been filed in time." The petition was filed on April 28, 1969.

Section 2101(c) of Title 28 provides that "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree." Although the Section also authorizes a Justice of this Court to extend the time for petitioning for 60 days, an application for such extension must be filed within the original 90-day period, as Rule 34(2) of the Rules of this Court recognizes. Since these statutory limits are jurisdictional, the petition should be denied as untimely.

Respectfully submitted.

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MAY 1969.

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